> Here defendants were represented by two other members of the law firm, of which the leading member was ill; one of the attorneys representing appellants at the trial having been present before the commissioner. There was no good reason for continuance of the case upon ground of the illness of one of several attorneys, and the motion was properly denied. * * *

"On certiorari granted, the Supreme Court affirmed the Lias case in a per curiam opinion, 284 U. S. 584.

"In the case at bar, appellants were represented by counsel of their own choice. We have examined the record and can find no indication that their counsel was incompetent or negligent. The insinuations now made on behalf of appellants that he was 'ineffective' because of the loss of his sense of hearing, finds no justification in this record. In the face of the facts and circumstances shown by this record the first contention of the appellants must be over-ruled.

"The contention that the Government failed to show beyond a reasonable doubt that the devices and labels in question were shipped in interstate commerce is likewise untenable. The appellants themselves called many witnesses from neighboring states to show that they had used devices similar to those in question with beneficial results. Many of these witnesses actually dealt in such devices. On this record it might fairly be said that there is some conflict in the testimony that the devices were falsely labeled. There can be no question that the devices, or others like them, were introduced into interstate commerce. The shipment charged in the information was adequately proven by the testimony of the agent for the Railway Express Agency and its record, as well as consignee who appears to have been an agent for the defendant company engaged in part, at least, in selling their tubes.

"As far as the third contention is concerned, it is important to note that the appellants have taken from the instructions of the court to the jury, transcript of which covered more than fifteen pages, four lines, and sought to make it appear therefrom that the court intended to direct the jury that the leaflets and labels therein referred to had actually been shipped in interstate commerce. This is decidedly unfair and improper as will become evident when the whole charge is considered.

"At the outset of his instructions, the court said:

> There are two broad general questions involved in the case with which you will be required to concern yourselves. The first pertains to the interstate commerce phase. In that regard the Government has charged the device accompanied by a label and leaflet were shipped in interstate commerce from Chicago to Wyandotte, Michigan. You will have to decide whether the device and labeling were so shipped. If you find that the device and labeling were not shipped from Chicago to Wyandotte then it will be necessary for you to return a verdict of not guilty for all the defendants. If you decide the device and labeling were shipped from Chicago to Michigan, for your second consideration it will then be necessary for you to determine whether or not the labels and leaflets contain a false and misleading statement.

"Our examination of the record convinces us that the jury was fully and fairly instructed by the trial court, and that its verdict finding the defendants guilty is amply supported by the evidence.

"The judgment of the District Court is affirmed."

On November 27, 1950, a petition for rehearing was filed by the defendants with the United States Court of Appeals for the Seventh Circuit, and was denied on December 15, 1950. The defendants thereupon filed a petition for certiorari with the United States Supreme Court, and this petition was denied on March 12, 1951.

3437. Misbranding of Hollywood Vita-Rol device. U. S. v. 125 Cartons * * *. (F. D. C. No. 30382. Sample No. 24951-L.)

LIBEL FILED: January 15, 1951, Eastern District of Pennsylvania.

ALLEGED SHIPMENT: On or about December 4 and 6, 1950, by the S & D Engineering Co., from Glendale, Calif.

PRODUCT: 125 cartons each containing 1 *Hollywood Vita-Rol device* at Philadelphia, Pa., in possession of Gimbel Bros. A leaflet entitled "Hollywood Vita-Rol Instructions" was shipped with the product. The device consisted of an electrically heated roller covered with corrugated rubber.

RESULTS OF INVESTIGATION: There was on display in the consignee's store, together with the device, a placard entitled "Vita-Rol" which had been prepared by Gimbel Bros.

NATURE OF CHARGE: Misbranding, Section 502 (a), the statement appearing in the above-mentioned leaflet, namely, "Both men and women use the Vita-Rol to maintain a slim, trim, figure by massaging those troublesome bulges or spots," was false and misleading. The statement represented and suggested that the device was effective for spot reducing, whereas the device was not effective for such purpose. The device was misbranded in the above respect when introduced into and while in interstate commerce.

Further misbranding, Section 502 (a), the statement appearing in the above-mentioned placard, namely, "roll away pounds," was false and misleading. The statement represented and suggested that the device was effective for reducing, whereas the device was not effective for such purpose. The device was misbranded in the latter respect while held for sale after shipment in interstate commerce.

DISPOSITION: May 9, 1951. Gimbel Bros., claimant, having consented to the entry of a decree, judgment of condemnation was entered and the court ordered that the device be released under bond for relabeling and that the leaflets and placards be destroyed, under the supervision of the Food and Drug Administration.

3438. Misbranding of Spectro-Chrome device. U. S. v. 1 Device * * *. (F. D. C. No. 16846. Sample No. 16303–H.)

LIBEL FILED: July 16, 1945, Eastern District of Wisconsin.

ALLEGED SHIPMENT: On or about June 6, 1945, by the Dinshah Spectro-Chrome Institute, from Newfield, N. J.

PRODUCT: 1 *Spectro-Chrome device* at Milwaukee, Wis. The construction and appearance of the device was essentially the same as that of the device involved in notices of judgment on drugs and devices, No. 2098. The device was accompanied by various pieces of printed and graphic matter.

NATURE OF CHARGE: Misbranding, Section 502 (a), the labeling of the device contained false and misleading curative and therapeutic claims in substantially the same respect as that of the device involved in notices of judgment on drugs and devices, No. 2098.

DISPOSITION: On November 26, 1945, no claimant having appeared, the court ordered that the device be released to the Food and Drug Administration for the purpose of testing. On October 7, 1946, the court entered an order authorizing the Government to retain possession of the device and its accompanying labeling until the further order of the court. On May 29, 1951, the court entered an order authorizing the Food and Drug Administration to retain possession of the device and the accompanying labeling and to make such use of the device and labeling as it may desire.